PRESCRIPTION: CONFUSION BETWEEN ADVERSE POSSESSION, PRESCRIPTION AND DEDICATION.—While it may make no difference in immediate result in a particular case whether it is said that a highway is established upon the principle of dedication, proved by long continued user by the public, or whether it is said that it is gained by prescription, carelessness in the use of language may lead to difficulty in practical conclusions. It is very certain that at the common law there can be no public way by prescription,[1] nor indeed any private easement either by grant or prescription except so far as appurtenant to another estate.[2] The difficulty with the acquisition of a public way by prescription is not alone that the public is incapable of taking property by grant—a reason no longer controlling since the "lost grant" theory of prescription is obsolescent.[3] Nor is the denial by the common law judges of the possibility of the creation of a highway by prescription under a twenty years' user merely a corollary from the abstract legal proposition that there can be no easement in gross in favor of an individual independently of his ownership of a dominant estate; hence none in favor of the totality of such individuals constituting the public. The true reason would seem to be the impolicy of a rule which would freely permit the creation of rights of a permanent nature in the land of another—a principle which has resulted in our law's limiting in rather an arbitrary manner the number of easements possible.[4] Lord Bowen said: "Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many persons besides the owners, under the fear that their good nature may be misunderstood."[5] Though the learned judge was speaking

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[1] Tiffany, Real Property, § 452 note; Bolger v. Foss (1884), 65 Cal. 250, 3 Pac. 871; State v. Kansas City etc. R. Co. (1876), 45 Iowa 139; Attorney General v. Antrobus (1905), 2 Ch. 188, 198 (per Farwell, J. "The public as such cannot prescribe"); Folkestone Corporation v. Brockman (1914) A. C. 338, Ann. Cas. 1914-D 320, 335; 2 Bl. Comm. 263-4; 22 Am. & Eng. Encyc. Law (2d. ed.), 1217-1218 ("The true doctrine seems to be that long use of a public easement is evidence of a dedication.")

[2] "It is clearly established now that there is no such right known to the law as an easement in gross." Goddard, Easements (6th ed.) 8. Even where the easement in gross is recognized, it is scarcely a property right, for it is generally held to be neither assignable nor inheritable. Jones, Easements, § 39.

[3] Unfortunately the "lost grant" theory of prescription can not be said to be wholly supplanted by the adverse user theory. It has frequently been referred to in California cases as the basis of prescription rights. Hanson v. McCue (1871), 42 Cal. 303; Sullivan v. Zeiner (1893), 98 Cal., 346, 33 Pac. 209; Clark v. Clark (1901), 133 Cal. 667, 66 Pac. 10.

[4] This even forbids the landowner to create burdens indefinitely. Brougham, L. C., in Keppell v. Bailey, 2 Myl. & K. 517, 537: "Incidents of a novel kind cannot be devised and attached to property, at the fancy or caprice of any owner."

[5] Blount v. Layard (1891), 2 Ch. 691 n.

of the public right to fish, his language is equally applicable to a highway. The doctrine frequently recognized in American courts—often without noticing the fundamental difference between prescription and implied dedication—that a public highway may be established by prescription stimulates unsocial conduct on the part of landowners.[6]

The failure to distinguish between prescription and implied dedication tends to confuse the real nature of prescription. Thus, we find courts and lawyers in highway cases referring to the fact that the enjoyment of the road is had with the knowledge of the landowner—a fact which should be irrelevant in the establishment of a way by prescription, although a material element in proving dedication.[7] The amended complaint set out in *People v. Power* contained such language,[8] and while the court properly rests its opinion upon the theory of dedication, it quotes from Hartley v. Vermillion language which would seem to recognize the possibility of a highway by prescription.[9] The language quoted is, it is submitted, merely dictum, and no case in California has decided that a highway may be created by prescription. Indeed, the amendment to section 2619 of the Political Code in 1874 which struck out the provision to the effect that five years' user as such created a highway, would seem to indicate the legislative intent to abolish the doctrine of highways by prescription.[10]

There has been nearly as much confusion in our legal reasoning by reason of the failure to keep distinct the fundamental difference between obtaining of title to land by adverse possession and title to easements by prescription as by the accidental historical distinction between the two kinds of prescriptive title. It is cer-

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[6] Jones, Easements, § 457. See criticism of the prescription theory in respect to highways by Dixon, C. J., in the dissenting opinion in Hanson v. Taylor (1869), 23 Wis. 547, 554.

[7] In a private easement case the court says: "To make the user adverse it must have been with the knowledge and acquiescence of the owner of the land." Barlow v. Frink (1915), 171 Cal. 165, 152 Pac. 290. This should be true only where it is necessary to break a privity between the parties, as in the case of landlord and tenant. That the acquisition of an easement by prescription does not turn on the "acquiescence" of the owner is shown by the fact that his vigorous oral objections do not interrupt the running of the period of prescription. Cox v. Clough (1886), 70 Cal. 345, 11 Pac. 732. On principle it would seem that in cases of dedication, knowledge would be an important element. "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence and no more." Per Parke, B., in Poole v. Huskinson (1842), 11 M. & W. 827, 830.

[8] (Sept. 10, 1918), 27 Cal. App. Dec. 317.

[9] (1903), 141 Cal. 339, 348, 74 Pac. 987.

[10] In Cordano v. Wright (1911), 159 Cal. 610, 622, 115 Pac. 227, Ann. Cas. 1912 C 1044, the Supreme Court seems to be of the opinion that since 1883 no highway can be created except by declaration of the Board of Supervisors of a county or by dedication of the land affected. See Cal. Pol. Code, § 2621.

tainly desirable that the principles underlying adverse possession and those underlying prescription should be unified, that the fiction of the lost grant upon which the latter doctrine was formerly rested be abandoned, and that the facts of open, notorious and continuous possession or enjoyment be taken as the basis of both.[11] But there are essential distinctions between the two sorts of prescriptive title, arising from the fact that the one has to do with possession of land, the other with the use of the land. These elements of difference the courts often properly emphasize. For example, while they recognize that a judgment in ejectment without actual recovery of the possession does not interrupt the continuity of the adverse possession of law, they hold that a judgment obtained against an easement claimant does have that effect.[12] There could scarcely be a clearer recognition of the essential difference between the possession of land and the assertion of a right over it which does not affect the possession. The distinction indeed is so elementary that it is a matter of surprise that courts should ever confuse the two things, even though they be called by the same name. And yet it is unfortunately true that such confusion now and then occurs. Thus, we find counsel repeatedly urge that an easement is not gained by prescription, because claimant has not paid taxes upon the easement during the prescriptive period. To which the courts make the answer that the assessment of the easement is presumed to be included in the assessment of the dominant tenement.[13] The obvious retort should be that there is no statutory condition that taxes be paid in acquiring an easement, for the statute merely requires the possessor of land to pay taxes in order to establish title by adverse possession, and does not mention the claimant to a right in another's land. To be sure, both Chief Justice Beatty and Justice McFarland expressed doubts as to whether the provisions of section 325 of the Code of Civil Procedure requiring payment of taxes applied to easements.[14] But the surprising

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[11] Peoples Water Co. v. Anderson (1915), 170 Cal. 683, 151 Pac. 127.

[12] Alta etc. Water Co. v. Hancock (1890), 85 Cal. 219, 24 Pac. 645; Montecito Valley Water Co. v. Santa Barbara (1904), 144 Cal. 578, 77 Pac. 1113; Harmon v. Carter (1900), Tenn. Ch., 59 S. W. 656, expressly or impliedly hold that a judgment in trespass or a final injunction interrupts the continuity of the enjoyment. On the other hand, mere recovery in ejectment without actual possession taken under the judgment does not interrupt the continuity of possession. Hodgkins v. Peoples Water Company (1918), Cal., 171 Pac. 945. A fortiori an injunction against an adverse possessor does not have the effect of preventing the latter from obtaining title by adverse possession. Ludtke v. Smith (1916), Tex., 186 S. W. 266.

[13] Conradt v. Hill (1889), 79 Cal. 587, 21 Pac. 1099; Frederick v. Dickey (1891), 91 Cal. 358, 27 Pac. 742; Gartland v. C. A. Hooper Co. (1918), 170 Pac. 1115. See also Heilbron v. Water Ditch Co. (1888), 75 Cal. 117, 17 Pac. 65; Hesperia L. & W. Co. v. Rogers (1890), 83 Cal. 10, 23 Pac. 196; Oneto v. Restano (1889), 78 Cal. 374, 20 Pac. 743.

[14] Conradt v. Hill; Frederick v. Dickey, supra, n. 13.

thing is that they should not have treated the proposition with the contempt that it deserved. That these learned and able judges should have given respectful attention to such a point and that it should not even yet have received its death blow indicates the ever present need of the careful distinction between rights of enjoyment and possession.

The dictum in Hartley v. Vermillion[15] to the effect that a highway may be gained either "by prescription" or by "implied dedication" is of a sort further to darken judgment in the whole field of prescription rights. Dedication implies an act on the part of the dedicator; prescription, on the contrary, in the sense which it has come to have in the modern law, rests upon the act of the claimant. The act of dedication may well be inferred by a jury from the fact that a defined road has long been used by the public, but the ultimate question is whether the evidence is of a sort to justify the finding of an act by the dedicator or an authorization by him of acts done by others. The attitude of the landowner in the normal case of a private easement by prescription where no privity of title exists between him and the easement claimant is or should be a matter of indifference; the claimant's attitude ought to be the important thing.

O. K. M.

PUBLIC UTILITIES: CONSTITUTIONALITY OF PROVISION FOR CONDEMNATION BY RAILROAD COMMISSION.—A decision of interest in interpreting the very large constitutional powers of the California Railroad Commission is that of *Marin Municipal Water District v. Marin Water and Power Company.*[1]

Section 47 of the Public Utilities Act[2] provides a scheme whereby certain classes of public corporations desiring to take over and operate an existing public utility, may proceed to acquire the property of such public utility. According to this section the value, or just compensation, to be paid for the property to be condemned is to be fixed by the Railroad Commission, leaving the question of right and power to condemn to the judgment of the superior court. The question in the present case is whether the transferring of the final fixing of value from the superior court, where it formerly lay, to the Railroad Commission of California is in conformity with the state and federal constitutions.

So far as the state constitution is concerned, section 23a of article XII, added in November, 1914, explicitly gives the legislature authority to confer such power on the Railroad Commission, and confirms section 47 of the Public Utilities Act. And as this amendment to the Constitution declares anything in the whole instrument inconsistent therewith of no avail, any other

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[15] Supra, n. 9.
[1] (May 27, 1918), 55 Cal. Dec. 793.
[2] Cal. Stats., Extra Sess., 1911, p. 55.